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March 15, 1995

VIA HAND DELIVERY

Gregory J. Vogt, Esq.
Deputy Chief
Cable Services Bureau
Federal Communications Commission
2033 M Street, N.W., Room 918-C
Washington, D.C. 20554

Re: MM Docket No. 92-260 (Cable Home Wiring)

Dear Greg:

In am writing to follow up our recent meeting relating to cable home wiring issues. In response to your inquiry regarding Liberty Cable's status as a "cable operator" under federal law, we mentioned that litigation was pending on that very issue. Accordingly, I thought you might be interested in the enclosed recent decision issued by the United States District Court for the Southern District of New York. The judge in this decision has found, as Time Warner has long suspected, that Liberty Cable operates facilities in New York City which fall squarely within the definition of "cable systems" set forth in 47 U.S.C. § 522(6). Moreover, Liberty's operation of such facilities without obtaining a franchise from New York City is in violation of federal, state and local law. Thus, the judge denied Liberty's request for an injunction against proceedings instituted by the New York State Commission on Cable Television challenging Liberty's operation without a franchise.

Best regards.

Very truly yours,

Art Harding

Arthur H. Harding
Counsel for Time Warner
Entertainment Company, L.P.

AHH:ka

cc: William F. Caton, Acting Secretary

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

LIBERTY CABLE COMPANY, INC., SIXTY SUTTON CORP. and JACK A. VEERMAN, Plaintiffs, -against- THE CITY OF NEW YORK and RALPH A. BALZANO, Commissioner of Department of Information Technology and Telecommunications, THE NEW YORK STATE COMMISSION ON CABLE TELEVISION, WILLIAM B. FINNERAN, GERARD D. DI MARCO, BARBARA T. ROCHMAN, DAVID F. WILBUR, and JOHN PASSIDOMO, Defendants, THE UNITED STATES OF AMERICA, TIME WARNER CABLE OF NEW YORK CITY and PARAGON CABLE MANHATTAN, Defendants-Intervenors.	94 Civ. 8886 (LAP) **OPINION**

74424

LORETTA A. PRESKA, District Judge:

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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

LIBERTY CABLE COMPANY, INC., SIXTY SUTTON CORP. and JACK A. VEERMAN, Plaintiffs, -against- THE CITY OF NEW YORK and RALPH A. BALZANO, Commissioner of Department of Information Technology and Telecommunications, THE NEW YORK STATE COMMISSION ON CABLE TELEVISION, WILLIAM B. FINNERAN, GERARD D. DI MARCO, BARBARA T. ROCHMAN, DAVID F. WILBUR, and JOHN PASSIDOMO, Defendants, THE UNITED STATES OF AMERICA, TIME WARNER CABLE OF NEW YORK CITY and PARAGON CABLE MANHATTAN, Defendants-Intervenors.	94 Civ. 8886 (LAP) **OPINION**

LORETTA A. PRESKA, District Judge:

Plaintiffs Liberty Cable Co., Inc. ("Liberty"), Sixty Sutton Corp. ("Sixty Sutton"), and Jack A. Veerman seek, inter alia, a declaratory judgment that 47 U.S.C. §§ 522(7) and 541(b) are unconstitutional. Before me now is their motion for a preliminary injunction against agencies and officials of New York State (the "State") and the City of New York (the "City") and defendants' motion to dismiss the complaint. For the reasons stated below, the complaint is dismissed as to certain claims and, as to the remainder, plaintiffs' motion for a preliminary injunction is denied.

BACKGROUND

I. The Statutory Scheme Governing Cable Television

"Cable operators" in the City of New York are regulated on the federal, state, and city level. On the federal level, the Cable Communications Policy Act of 1984, 47 U.S.C. §§ 521 et seq. (the "Cable Act") regulates "cable operators." A "cable operator" is defined in pertinent part as "any person or group of persons . . . who provides cable service over a cable system and directly or through one or more affiliates owns a significant interest in such cable system." 47 U.S.C. § 522(5). A "cable system" is defined in pertinent part as:

> a facility, consisting of a set of closed transmission paths and associated signal generation, reception, and control equipment that is designed to provide cable service which includes video programming and which is provided to multiple subscribers within a community, but such term does not include . . . a facility that serves only subscribers in 1 or more multiple unit dwellings under common ownership, control, or management, unless such facility or facilities uses any public right-of-way.

47 U.S.C. § 522(7). The exclusion in the definition of a cable franchise has been referred to as the "private cable exemption."

Aside from exceptions not relevant here, "a cable operator may not provide cable service without a franchise." 47 U.S.C. § 541(b). A "franchise" is "an initial authorization, or renewal thereof . . . issued by a franchising authority . . . which authorizes the construction or operation of a cable system." 47 U.S.C. § 522(9). A "franchising authority" is defined as "any governmental entity empowered by Federal, State, or local

law to grant a franchise." 47 U.S.C. § 522(10). Thus, a cable operator must look to state and/or local authorities to obtain a franchise.

However, not all types of cable systems need comply with this regulatory scheme. Under the "private cable exemption" of the Cable Act, a cable system is exempt from these franchising requirements if it meets two tests. First, it must be a system confined to commonly owned, controlled, or managed multiple unit dwellings. 47 U.S.C. § 522(7). Second, the system must not use any public right-of-way, for example, by placing coaxial cable or hard wire above or under public streets or rights of way. Id. Traditional cable systems, which are subject to regulation, deliver programming by means of coaxial cables that physically connect the cable operator with the subscriber and that generally are laid under city streets or along utility lines.

Satellite master antenna television ("SMATV"), however, is a type of cable service that can fit within the private cable exemption and, when it does, need not obtain a franchise. See F.C.C. v. Beach Communications, 113 S.Ct. 2096, 2099-2100 (1993) (citing In re Definition of a Cable Television Sys., 5 F.C.C.Rcd. 7638 (1990)).[1] SMATV provides cable service by means of a satellite dish and reception facilities installed on the grounds of

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[1] The litigation in the Beach case has been fairly protracted. For ease of reference, the decisions will be referred to as follows: Beach Communications v. F.C.C., 959 F.2d 975 (D.C. Cir. 1992) ("Beach I"), appeal after remand, 965 F.2d 1103 (D.C. Cir. 1992) ("Beach II"), rev'd, 113 S. Ct. 2096 (1993) ("Beach III"), on remand, 10 F.3d 811 (D.C. Cir. 1993) ("Beach IV").

private buildings. Under 47 U.S.C. § 522(7), a SMATV system that uses cable to link more than one multiple unit dwelling under common ownership, control, or management falls within the private cable exemption. However, a SMATV system that uses cable to link more than one multiple unit dwelling not under common ownership, control, or management does not fall within the private cable exemption and is subject to the regulation imposed by the Cable Act.

After the federal regulations, the next levels of regulation a would-be cable operator in the City of New York must look to are the State and then the City. New York law provides that a cable television system may not commence or expand its operations without a franchise from the municipality in which it proposes to provide or expand service. N.Y. Exec. Law § 819(1) (McKinney 1982). In New York, a "cable television system" is defined as:

> any system which operates for hire the service of receiving and amplifying programs broadcast by one or more television or radio stations or any other programs originated by a cable television company or by any other party, and distributing such programs by wire, cable, microwave or other means, whether such means are owned or leased, to persons in one or more municipalities who subscribe to such service.

N.Y. Exec. Law § 812(2) (McKinney 1982 & Supp. 1995). New York law also authorizes municipalities to grant the franchises which are required of cable television systems:

> A municipality shall have the power to require a franchise of any cable television system providing service within the munici-

> pality, notwithstanding that said cable television system does not occupy, use or in any way traverse a public street. The provision of any municipal charter or other law authorizing a municipality to require and grant franchises is hereby enlarged and expanded, to the extent necessary, to authorize such franchises.

N.Y. Exec. Law § 819(2). Once a franchise has been awarded by the municipality, it must be confirmed by the New York State Commission on Cable Television ("NYSCC") to be effective. N.Y. Exec. Law § 821(1) (McKinney 1982).

In New York City, the municipal franchising agency authorized by the New York City Charter to grant franchises to cable television systems is the Department of Information Technology and Telecommunications ("DOITT"), formerly the Department of Telecommunications and Energy. Chapter 48, § 1072(c). On October 13, 1993, the New York City Council authorized Resolution No. 1639 ("Resolution 1639"), which states in pertinent part that:

> The Council authorizes the Department of Telecommunications and Energy to grant non-exclusive franchises for the provision of cable television services and the installation of cable television facilities and associated equipment on, over, and under the inalienable property of the City of New York.

(Resolution 1639).[2]

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[2] A copy of Resolution 1639 can be found annexed to the Affidavit of John Grow executed January 30, 1995 ("Grow Aff.") at exhibit 10 and to the First Amended Complaint dated December 13, 1994 ("First Amd. Compl.") as exhibit E.

On February 24, 1995, after the plaintiffs had commenced the instant action, DOITT issued a notice of rulemaking regarding solicitations for franchises for the provision of cable service in a manner that does not use the inalienable property of the City (the "New Rulemaking"). (Second Bronston Aff. ¶¶ 1-2, Ex. A).[3] The notice stated, inter alia, that the public written comment period for the proposed rules will close on April 3, 1995, and a public hearing is scheduled for April 4, 1995. (Second Bronston Aff. ¶ 3, Ex. A). The proposed rules also include deadlines for the submission of franchise applications, DOITT's review of such applications, and the preparation of agreements. (Second Bronston Aff. ¶ 3, Ex. A). Agreements must be approved by the Franchise and Concession Review Committee and by the Mayor. (Second Bronston Aff., Ex. A, § 6-03).

II. The Cable Services Provided By Liberty

Liberty provides cable service in several different ways in the City, including the use of SMATV systems. (Price Aff. ¶ 3).[4] Liberty receives satellite and broadcast television signals at its "head end" facility on East 95th Street in Manhattan. (Price Aff. ¶ 5). These signals are processed and transmitted by microwave to reception antennae located on multiple unit buildings located throughout the greater metropolitan area. (Price Aff. ¶ 5). Liberty's reception antennae deliver cable

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[3] Reference is to the Supplemental Affidavit of David Bronston executed February 27, 1995 ("Second Bronston Aff.").

[4] Reference is to the Affidavit of Peter O. Price executed December 20, 1994 (the "Price Aff.").

service to building residents using one of three configurations. (Price Aff. ¶ 7).

The first type of system employed by Liberty is known as the "Stand Alone System" configuration. The Stand Alone System utilizes a single microwave reception antenna to deliver cable service to the residents of the single building where the antenna is located. (Price Aff. ¶ 8).

The second system used by Liberty, referred to as the "Common System" configuration, utilizes a single microwave reception antenna located on the roof of a multiple unit dwelling to deliver cable service to two or more proximate multiple unit buildings under common ownership, control or management. (Price Aff. ¶ 9). The building with the antenna is linked by coaxial cable to the other buildings, without using public property. (Price Aff. ¶ 9).

Under 47 U.S.C. § 522(7), Liberty's Stand Alone Systems and Common Systems are SMATV systems subject to the private cable exemption, not "cable systems." These two systems are classified as such because they meet the common ownership requirement set forth in that section and do not use the public right-of-way.

The third system used by Liberty, and the one in controversy here, is Liberty's "Non-Common System" configuration. With the Non-Common System, a single microwave reception antenna is located on the roof of a multiple unit dwelling to deliver service to two or more multiple unit dwellings. (Price Aff. ¶ 10). As with the Common Systems, the various buildings are

linked with coaxial cable without using public property. Id. However, unlike Liberty's Common Systems, the Non-Common System links buildings which are not commonly owned, controlled, or managed. Id. Plaintiff Sixty Sutton is one such building. Id. The reception antenna that serves Sixty Sutton is located on River Tower, a building that is not commonly owned, managed, or controlled with Sixty Sutton. (Price Aff. ¶ 11). Liberty constructed its Non-Common Systems, including the system at Sixty Sutton, during the period from January 1993 to August 1994. (Price Aff. ¶ 12).

III. The Administrative Proceeding

On or about May 31, 1994, the NYSCC received a complaint from Time Warner Cable of New York City ("Time Warner") and Paragon Cable Manhattan ("Paragon") which requested an investigation into how Liberty provided cable service in Manhattan. (Grow Aff., Ex. 1). Time Warner and Paragon, both traditional cable system operators, alleged that Liberty, which represents itself as an SMATV company, was actually improperly operating as a "cable operator," as defined by the Cable Act, without a franchise in violation of state and federal law. Id.

The NYSCC subsequently conducted an on-site investigation into Time Warner's charges against Liberty. Staff from the NYSCC conducted site inspections at two locations. At both locations, it was observed that a coaxial wire ran from one building to another, either across an alley or the rooftops of several other buildings. Each wire was also lashed to or ran

alongside the wire of a franchised cable company. (Grow Aff. ¶ 3, Ex. 3).

In a letter to the NYSCC dated June 28, 1994,[5] Liberty acknowledged that Liberty was running cables among residential buildings on the same block. Liberty stated that many -- but not all -- of these buildings were under common ownership, management, or control. Liberty argued, however, that it was the City's policy that a franchise was unnecessary where cables did not use or cross public property and that because Liberty's cables did not use or cross public property, Liberty did not require a franchise. Liberty also stated that it wired its serviced buildings in such a fashion in reliance on the City's policy. (Grow Aff., Ex. 2).

By Order to Show Cause dated August 23, 1994 (the "Order to Show Cause"),[6] the NYSCC directed Liberty to show cause by September 18, 1994, why it should not be determined to be a cable television system subject to the franchising and confirmation requirements of State law or, alternatively, why it should not be compelled to remove all interconnections by wire of buildings not commonly owned, controlled, or managed and be ordered to cease and desist from providing cable television services by means of such wires, until Liberty obtained a franchise and certificate of confirmation. The Order to Show Cause

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[5] A copy of this letter is annexed to the Grow Aff. as exhibit 2.

[6] A copy of the Order to Show Cause is annexed to the Grow Aff. as exhibit 3.

also provided that Liberty was entitled to be heard and present evidence relating to the allegations stated. (Grow Aff. ¶ 7, Ex. 3).

Liberty requested two extensions of time in which to respond to the Order to Show Cause, the first for a period of thirty days, extending Liberty's time to respond to October 19, 1994. (Grow Aff. ¶ 8, Ex. 4). The request was granted. (Grow Aff. ¶ 8, Ex. 5). Liberty's second request, made in a letter dated October 18, 1994, was for an extension of one hundred-eighty days. (Grow Aff. ¶ 9, Ex. 6). Liberty explained that the reason for the extension was that Liberty was engaged in discussions with DOITT about obtaining a franchise and agreed not to construct any new Non-Common Systems during the one hundred-eighty day extension. Id. The NYSCC extended Liberty's time to respond to November 1, 1994. (Grow Aff. ¶ 9, Ex. 7). On October 31, 1994, Liberty filed its Answer and Appearance to the Order to Show Cause, again requesting an adjournment in order to negotiate with DOITT. (Grow Aff. ¶ 10, Ex. 9).

Liberty, meanwhile, sent a letter dated October 28, 1994, to DOITT expressing Liberty's interest in applying for a franchise pursuant to Resolution 1639. (Grow Aff. ¶ 10, Ex. 8). On October 31, 1994, DOITT informed the NYSCC that it was in receipt of Liberty's letter. (Grow Aff. ¶ 11, Ex. 10). DOITT

stated that it expected to issue a Request For Proposals ("RFP")[7] within the next few months. Id.

On December 9, 1994, the first day of the administrative hearing, the NYSCC issued a standstill order (the "Standstill Order"). (Grow Aff. ¶ 12). The Standstill Order required that:

> there be no additional cable or closed transmission interconnections of buildings not commonly owned, controlled or managed and that in buildings where service was not currently being provided, that no new subscribers could be serviced through such hardware. Finally, Liberty was enjoined from energizing services at those buildings not commonly owned, controlled or managed presently connected by hard wire connecting that were not already energized.

(Grow Aff. ¶ 12, Ex. 11).

IV. Proceedings In This Court

On December 8, 1994, before the Commission's hearing began, Liberty, Sixty Sutton, and Bud Holman[8] filed a complaint in this Court which was subsequently amended on December 13,

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[7] An RFP is part of the standard minimum franchising procedures of 9 NYCRR, Part 594, promulgated by the NYSCC. (Grow Aff. ¶ 11).

[8] Bud Holman, one of Liberty's subscribers and a resident of Sixty Sutton, (First Amd. Compl. ¶¶ 5-6), subsequently filed a notice of voluntary dismissal pursuant to Fed. R. Civ. P. 41(a) in this action.

Jack A. Veerman, another Liberty customer and a member of the Board of Directors of Sixty Sutton (Affidavit of Jack A. Veerman ("Veerman Aff.") executed February 17, 1995 at ¶¶ 1-2), later joined the litigation as a plaintiff.

1994.[9] On December 22, 1994, the plaintiffs applied for a temporary restraining order and preliminary injunction enjoining the defendants from enforcing or attempting to enforce 47 U.S.C. §§ 522(7) and 541 so as to require Liberty either (i) to cease serving subscribers in Liberty cable systems which serve more than one multiple unit dwelling not under common ownership, control or management and which do not use any public property or rights-of-way, i.e., Liberty's Non-Common Systems, or (ii) to obtain a City franchise as a condition of continuing to serve such Non-Common Systems. Liberty and Sixty Sutton also sought to enjoin defendants from continuing to enforce the Standstill Order. A temporary restraining order was granted which, by consent of the parties, was extended to and including March 10, 1995.

In the meantime, Time Warner and Paragon moved to intervene in this action as defendants. The motion to intervene was granted on February 14, 1995.[10]

The defendants have moved to dismiss the complaint on a variety of grounds, including ripeness and abstention. Extensive

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[9] The First Amended Complaint was later amended. A Second Amended Complaint was filed on February 21, 1995 ("Second Amd. Compl.").

[10] Those parties demonstrated both "an interest relating to the property or transaction which is the subject of th[is] action and [that they are] so situated that the disposition of the action may as a practical matter impede or impair [their] ability to protect that interest" and that their interest is not adequately represented by existing parties, (Fed. R. Civ. P. 24(a)) and that one or more of their "claim[s] or defense[s] and the main action have a question of law or fact in common." (Fed. R. Civ. P. 24(b)).

and useful oral argument was held on March 1, 1995 and March 3, 1995. For the reasons set forth below, defendants' motion to dismiss on the grounds of lack of ripeness is granted with respect to all of plaintiffs' claims except their equal protection claims; as to plaintiffs' equal protection claims, defendants' motions to dismiss are denied, and plaintiffs' motion for a preliminary injunction is denied.[11]

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[11] It is well-established that when considering a motion to dismiss based on lack of jurisdiction, a court may consider matters outside the pleadings. See, e.g., Land v. Dollar, 330 U.S. 731, 735 n.4 (1941) (stating that when a question of the district court's jurisdiction is raised, "the court may inquire by affidavits or otherwise, into the facts as they exist"); Theunissen v. Matthews, 935 F.2d 1454, 1459 (6th Cir. 1991) (noting that affidavits may be considered in deciding a motion pursuant to Fed. R. Civ. P. 12(b)(2)); McCarthy v. United States, 850 F.2d 558, 560 (9th Cir. 1988) (rejecting the argument that the district court's dismissal pursuant to Fed. R. Civ. P. 12(b)(1) should be treated as a summary judgment motion where the court considered matters outside the pleadings; "where considering a motion to dismiss pursuant to Rule 12(b)(1), the district court is not restricted to the face of the pleadings, but may review any evidence, such as affidavits and testimony, to resolve factual disputes concerning the existence of jurisdiction"), cert. denied, 489 U.S. 1052 (1989); Alfadda v. Fenn, 751 F. Supp. 1114, 1118 (S.D.N.Y. 1990) (stating that a court may resolve factual disputes when a party moves to dismiss for lack of subject matter jurisdiction), rev'd on other grounds, 935 F.2d 475 (2d Cir.), cert. denied, 502 U.S. 1005 (1991); L'Europeenne De Banque v. La Republica de Venezuela, 700 F. Supp. 114, 119 n.6 (S.D.N.Y. 1988) (stating that on a motion to dismiss for lack of jurisdiction, the court may look to affidavits as well as to the pleadings); Loria & Weinhaus, Inc. v. H. R. Kaminsky & Sons, Inc., 80 F.R.D. 494, 497-98 (S.D.N.Y. 1978) (noting that the pleadings and affidavits may be considered when determining whether to grant a motion to dismiss for lack of personal jurisdiction). Ripeness is a prerequisite to the exercise of jurisdiction by federal courts. See, e.g., Federal Election Comm'n v. Central Long Island Tax Reform Immediately Comm., 616 F.2d 45, 51 (2d Cir. 1980). Consequently, despite my consideration of the affidavits and various materials outside the pleadings submitted by the parties, this motion is properly considered as a motion to dismiss.

DISCUSSION

I. Ripeness

The injunctive and declaratory remedies sought by Liberty and Sixty Sutton are "discretionary, and courts traditionally have been reluctant to apply them to administrative determinations unless these arise in the context of a controversy 'ripe' for judicial resolution." Abbott Laboratories v. Gardner, 387 U.S. 136, 148 (1967). Ripeness is a "constitutional prerequisite to exercise of jurisdiction by federal courts." Federal Election Comm'n. v. Central Long Island Tax Reform Immediately Comm., 616 F.2d 45, 51 (2d Cir. 1980) (citing Aetna Life Ins. Co. v. Haworth, 300 U.S. 227, 240-41 (1937)). The rationale behind the requirement of ripeness is:

> to prevent the courts, through avoidance of premature adjudication, from entangling themselves in abstract disagreements over administrative policies, and also to protect the agencies from judicial interference until an administrative decision has been formalized and its effects felt in a concrete way by the challenging parties.

Abbott Laboratories, 387 U.S. at 148-49. See also Pacific Gas & Elec. Co. v. State Energy Resources Conservation & Dev. Comm'n, 461 U.S. 190, 200-01 (1983); In re Drexel Burnham Lambert Group, Inc., 995 F.2d 1138, 1146 (2d Cir. 1993). As the Court of Appeals put it, ripeness "turns on whether there are future events so contingent in nature that there is no certainty they will ever occur." In re Drexel Burnham Lambert Group, Inc., 995 F.2d at 1146; see also Amsat Cable v. Cablevision of Conn., 6 F.3d 867, 872 (2d Cir. 1993).

In determining whether an issue is properly considered ripe for adjudication, courts are to conduct a two-pronged inquiry. First, a court must "evaluate . . . the fitness of the issues for judicial decision." Abbott Laboratories, 387 U.S. at 149; Amsat Cable, 6 F.3d at 872; In re Drexel Burnham Lambert Group, Inc., 995 F.2d at 1146. In determining whether issues are fit for review, a court must look to "whether the agency action is 'final'" and "whether the issue is purely legal or whether 'consideration of the underlying legal issues would necessarily be facilitated if they were raised in the context of a specific attempt to enforce the regulations.'" In re Combustion Equip. Assocs., Inc., 838 F.2d 35, 37-38 (2d Cir. 1988) (quoting Gardner v. Toilet Goods Assoc., 387 U.S. 167, 171 (1967)). The second factor a court must look to in determining whether an issue is ripe is "the hardship to the parties of withholding court consideration." Abbott Laboratories, 387 U.S. at 149; Amsat Cable, 6 F.3d at 872; In re Drexel Burnham Lambert Group, Inc., 995 F.2d at 1146.

A. Liberty's Claims

1. First Amendment

In its first claim for relief, Liberty (as well as Sixty Sutton and Veerman) challenge certain provisions of the Cable Act, in particular, 47 U.S.C. § 522(7), which defines Liberty's Non-Common System as a "cable system", and 47 U.S.C. § 541(b), which imposes the franchising requirement on cable systems. (Second Amd. Compl. ¶¶ 71-75). Plaintiffs claim that

the imposition of a franchise requirement on Liberty's Non-Common Systems, including the Non-Common System at Sixty Sutton, "prevents, burdens, violates and interferes with Plaintiff's [sic] rights to engage in protected speech activity on private property in violation of the First Amendment to the United States Constitution." (Second Amd. Compl. ¶ 74). Plaintiffs assert that these two provisions are invalid both facially and as applied to the Non-Common Systems which do not utilize public property or rights of way. (Second Amd. Compl. ¶ 75).

The defendants have moved to dismiss plaintiffs' challenge to the Cable Act as unripe. The defendants rely heavily on Beach I, 959 F.2d 975, and argue that no meaningful distinction can be drawn between Beach I and the instant case.

In Beach I, the petitioners were SMATV companies that brought a facial challenge to the Cable Act's requirement, as interpreted by the Federal Communications Commission (the "FCC"), that "external, quasi-private" SMATV facilities be franchised. Id. at 980. The Court of Appeals for the District of Columbia Circuit explained that this type of facility was "a SMATV facility with wires or other closed transmission paths interconnecting separately-owned, controlled and managed multiple-unit dwellings, without those wires using public rights-of-way," id., a definition which exactly describes Liberty's Non-Common System. The petitioners argued that the FCC incorrectly interpreted the definition of "cable system" to cover external, quasi-private SMATV, and that this definition violated their First Amendment

and Equal Protection rights by requiring them to obtain local franchises. Id.

In considering whether plaintiffs' claims were ripe, the Court of Appeals noted that the obligations imposed by the Cable Act were not "fully defined" and thus were impossible to evaluate. Id. at 983. It was because of this uncertainty about the nature of the duty that a local franchising system might impose and because "the justification for that duty will depend on local facts" that the Court held that petitioners' First Amendment challenge was not yet ripe. Id. at 984. As the Court put it:

> We cannot find the statute unconstitutional on its face because we do not know whether conditions in any given locality will justify a burden on petitioners' speech, nor do we know what kind of burden will need to be justified, nor the appropriate First Amendment standard. Thus, we cannot assess any claim of First Amendment infringement absent an as-applied challenge to some specific franchising requirement.

Id. at 976.

In reaching this conclusion, the Court applied the twofold inquiry articulated in Abbott Laboratories, 387 U.S. at 136. With respect to the "fitness" inquiry, the Court explained that judicial review of a First Amendment issue is "likely to stand on a much surer footing in the context of a specific application of [the FCC's Cable Definition Rule] than could be the case in the framework of the generalized challenge made here." Beach I, 959 F.2d at 984 (citing Toilet Goods Ass'n v. Gardner, 387 U.S. 158, 164 (1967)). Consequently, the Court

ruled, it was beneficial to postpone its review of petitioners' facial challenge until there was an as-applied challenge. Id. As the Court explained:

> Different regimes will impose different burdens, which may or may not be justifiable under the First Amendment. Moreover, the judicial standard for evaluating the justification will vary with the regime. . . . A particular local franchising system may impose only an "incidental" burden on the speech of SMATV operators . . . [or] may impose "direct" burdens that require stricter First Amendment scrutiny.

Id. (citations omitted). In addition, the Court noted that a "court reviewing an as-applied challenge will have specific information about the local conditions that might justify SMATV franchising." Id.

The second prong of the Abbott Laboratories test is, of course, "hardship to the parties of withholding review." Id. at 985. The Beach I Court explained that:

> "The paradigmatic hardship situation is where a petitioner is put to the choice between incurring substantial costs to comply with allegedly unlawful agency regulations and risking serious penalties for noncompliance."

959 F.2d at 985 (quoting Natural Resources Defense Council v. E.P.A., 859 F.2d 156, 166 (D.C. Cir. 1988)). Applying this standard to the situation in Beach I, the Court noted first that if the petitioners did not comply with the challenged regulations, the petitioners might face civil, or even criminal, penalties. Id. The Court then discussed, however, that it was "unclear" whether the petitioners would incur "substantial" costs by complying with the statute and the local franchising scheme.

Id. In addition, the Court also noted that the choice between compliance and the risk of enforcement could be avoided by bringing an "anticipatory, as-applied challenge," id., which I take to mean a challenge to a particular known burden, as opposed to an attack on the facial validity of the statute.[12]

a. Fitness for Judicial Decision

The Beach I analysis addresses a situation virtually identical to the instant action. With respect to fitness for judicial review, the Beach I Court's analysis is exactly on point. Liberty has not yet applied for a franchise from DOITT, and neither the NYSCC nor DOITT has taken any final action with respect to Liberty; in fact, perhaps it is more accurate to say that these agencies have just begun to address Liberty.[13] Also

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[12] This interpretation is supported by the Court's earlier comment that it could not "assess any claim of First Amendment fringement absent an as-applied challenge to some specific franchising requirement." Id. at 976 (emphasis added).

[13] By means of comparison, it is instructive to consider City of Los Angeles v. Preferred Communications, Inc., 476 U.S. 488 (1986), appealed after remand, 13 F.3d 1327 (9th Cir.), cert. denied, 114 S.Ct. 2738 (1994). In Preferred Communications, a cable company sued the City of Los Angeles and the Department of Water and Power ("DWP") alleging violation of its rights under the First and Fourteenth Amendment and under §§ 1 and 2 of the Sherman Act by the City's refusal to grant it a cable television franchise and by the DWP's refusal to grant access to DWP's poles or underground conduits used for power lines. Id. at 490. The Court of Appeals for the Ninth Circuit affirmed the dismissal of the antitrust claims, but reversed the dismissal of the First Amendment Claim. Id. at 491. The Supreme Court agreed that the First Amendment claim should not have been dismissed, but was "unwilling to decide the legal questions posed by the parties without a more thoroughly developed record of proceedings in which the parties have an opportunity to prove those disputed factual assertions upon which they rely." Id. at 494. Thus, even in Preferred Communications, where final agency action had been taken, i.e., the City had (continued...)

as in Beach I, Liberty cannot identify what burdens the franchising scheme might impose after weighing, inter alia, Liberty's non-traditional method of transmission and the technical limitations attendant thereto.[14] Many of the burdens are permissive

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[13](...continued)
refused to grant a cable franchise, the Supreme Court found the legal questions raised were not appropriately addressed at that time.

On remand, the Ninth Circuit was unwilling to adjudicate the cable company's First Amendment challenges to the City's franchising scheme until the City issued another request for proposals and the cable company was given the opportunity to apply and compete for a franchise. 13 F.3d 1327, 1332-33 (9th Cir. 1994). In that way, it could be determined whether the cable company was "ready, willing and able" to operate a cable system, whether it had the appropriate qualifications, and what the terms of the franchise might be. Id. The Court explained that:

> Since there are so many ways we might well avoid having to confront these difficult constitutional issues, it would be precipitous of us to try to reach them at this time. Were we to try, we would have to "decide the legal questions posed by the parties without a more thoroughly developed record. . . ," something the Supreme Court refused to do when reviewing our last opinion. If we failed to follow the Court's example, "we would not escape the charge of rendering advisory opinions poorly disguised as sweeping dicta."

Id. at 1333 (citations omitted).

[14] I note that Martin Schwartz, counsel for Time Warner, pointed out on March 1, 1995 at argument that the burdens of a franchise initially proposed by DOITT tend to differ markedly from the eventual franchise which results from extended negotiations between DOITT and the cable operator. As Mr. Schwartz explained:

> I can tell you that the end product usually looks a lot different from the city's initial proposal. So that goes to the question as to whether this rule making which invites comments is going to be similar or identical to what ultimately eventuates. I would suggest
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> (continued...)

rather than mandatory (e.g., 47 U.S.C. § 545(a)(1) which allows cable operators to displace local franchising requirements relating to educational equipment obligations upon a demonstration of commercial impracticality), are graduated according to the number of channels delivered by the cable operator (e.g, 47 U.S.C. § 534(b)(1) which requires a cable system with 12 or fewer channels to carry at least three local commercial stations and a cable system with more than 12 channels to carry local commercial stations up to one-third of its channels; 9 NYCRR, part 595.4(b) which provides similarly graduated requirements with respect to

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[14](...continued)
that there is a great deal to be determined in terms of what the terms would be for several reasons.

(Transcript of oral argument held March 1, 1995 and March 3, 1995 ("Tr.") at 47). Lewis Finkelman, counsel for the City, also explained that:

> [T]hese are proposed rules. . . . Liberty is free to comment to point out why some of these conditions are not appropriate to a system like theirs. That's the whole point of this proposed rule making process, so the city can get input. We have never given a franchise like this. There are many issues that obviously are going to be troublesome that we want comments from interested parties on and are willing to hear them in order to determine what the provisions should be of the franchise agreement.
>
> It certainly is not a given [that the terms and conditions of the franchise finally authorized will be the same as those in the New Rulemaking]. And this is why, with respect to this process, it is certainly not a ripe challenge at this point.

(Tr. at 35-36).

public, educational or governmental ("PEG") access channels) or set limits that benefit prospective cable operators (e.g., 47 U.S.C. § 542(b) which provides a 5% cap on franchise fees but which does not prevent a municipality from accepting less). There is no way to know at this time what the ultimate mix of burdens might be. Also as in Beach I, 959 F.2d at 984, because we do not know the precise nature of the burdens imposed, it cannot be said what the appropriate level of scrutiny might be with which to evaluate plaintiffs' First Amendment challenge.[15] The factual record has simply not reached a stage of development

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[15] For example, in Turner Broadcasting Sys. v. Federal Communications Comm'n, 114 S.Ct. 2445 (1994), the Supreme Court decided that "the appropriate standard by which to evaluate the constitutionality of must-carry is the intermediate level of scrutiny applicable to content-neutral restrictions that impose an incidental burden on speech." On the other hand, a less rigorous standard is applicable to broadcast medium due to the "unique physical limitations of the broadcast medium." Id. at 2456; see, e.g., Red Lion Broadcasting Co. v. Federal Communications Comm'n, 395 U.S. 367, 388-90 (1969); New York Citizens Comm. on Cable TV v. Manhattan Cable TV, 651 F. Supp. 802, 817-18 (S.D.N.Y. 1986) (explaining that "differences among the various modes of communication justify differences in the First Amendment standards applied to them" and declining to decide what standard of review should apply to cable television "without more facts about cable television").